No. 11,119

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United States Circuit Court of Appeals

For the Ninth Circuit

HOUGHTON GIFFORD,

Appellant,

vs.

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA,

Appellee.

Reply Brief of Appellant

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Appellee's counsel have not attacked or impugned the principles of law, argument or citation of authorities set forth in the appellant's brief, but seeks to brush them all blandly aside by the statement contained in paragraph 6 on page 6 of their brief, that "appellant's arguments are not supported by his citations of authority which are inapplicable in any event to the facts in the case."

They do not, however, point out any defect in the argument or show in any wise why the authorities are inapplicable to the facts in the case. We stand by the argument advanced in our opening brief and we respectfully submit that the authorities cited are in point and do support the argument.

On page 7 under the heading "E. Argument" appellee cites the provisions of rule 56-C and in effect cites himself out of court. The rule as there quoted by appellee's counsel is as follows: "the judgment sought shall be rendered forthwith if the *pleadings*, etc. show there is no genuine issue as to any material fact, etc." Here no answer of defendants was filed. Only the complaint of plaintiff was in file.

We again reiterate our contentions made under point 3 on page 24 that the "DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WAS PREMATURE, AND THEREFORE A JUDGMENT BASED ON SUCH MOTION WAS IN ERROR." See the cases on pages 24, 25, 26, 27 and 28 of appellant's opening brief; also *Bowers v. Rose Mfg. Co.*, 149 Fed.(2d) 613, decided by this very Circuit in April, 1945).

In that case the Court, on page 613, said:

> "Since the complaint stated a cause of action *and no issue was joined, the case was not in a position for a summary judgment.*"

It has been very recently decided that Rule 56 does not invest the Court with power summarily to try factual issues but only authorizes summary judgment if it appears that there is a *complete absence of any genuine issue and all doubts thereon must be resolved against the moving party;* see

Colley v. Igoe, 8 Fed. Rules, Service, p. 862 (June 26, 1945);

Toebelman v. Miss. Pipe Line Co., 130 F. (2nd) 1016;

Hummel v. Riordan, 56 Fed. Supp. 983;

Whitaker v. Coleman, 115 F. (2nd) 305;

Sartor v. Ark. Gas Co., 321 U.S. 620-624-627-628 (88 L.E. 967, 972).

As was said in the *Colley v. Igoe* case, supra, "Summary judgment procedure is not a catch-penny contrivance to take unwary litigants into its toils and deprive them of a trial; it is a liberal measure, liberally designed for arriving at the truth; its purpose is not to cut litigants off from their right of trial by jury."

Again it has been said by the U. S. Circuit Court of Appeals, Second Circuit, April 26, 1945, as follows:

> "Trial courts should exercise great care in granting motions for summary judgment and should not deny a litigant a trial where there is the slightest doubt as to the facts; see
>
> *Dohler Co. v. U. S.,* 149 F.(2d) 130-135—Syl. 5 and 6."

At page 135, the Court in the *Dohler Company Case* said as follows:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time-saving device. But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. Cf. Arenas v. United States, 322 U.S. 419, 429, 433, 64 S. Ct. 1090, 88 L. Ed. 1363. The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered. Sartor v. Arkansas

Natural Gas Corporation, 321 U.S. 620, 624, 64 S.Ct. 724, 88 L. Ed. 967."

See also, along this line, the case of:

Firemen's Mutual Insurance Co. v. Aponaug Mfg. Co., 149 F.(2nd) 359,

where the first syllabus is as follows:

"The court should not grant summary judgment for defendants on the ground that the affidavits submitted in support of the claim are incredible, that the witness has been impeached, or that if a verdict were rendered for the plaintiffs the court would be compelled to set it aside. If there is some admissible evidence in support of the claim the court should not grant summary judgment."

In this very Circuit on June 30, 1944, this court had occasion to consider affidavits in support of a summary motion and Justice Mathews in denying the motion held that statements of legal conclusions in the moving affidavits should be disregarded as well as all statements made on information and belief. See

State of Washington v. Maricopa County, 140 F. (2nd) 871.

APPELLEE'S CASES

On page 10 of appellee's brief counsel cites several cases in support of his point that an insurer may limit by contract the time within which suit may be brought subject only to the condition that the interval is not unreasonable. The first case cited, *Gnuser v. Ocean Co.*, 57 Cal. App.(2d) 979, definitely holds that the plaintiff can recover even

though the action was not filed within the period of time fixed by the policy at two years and two days; see pages 982 and 984.

The next case cited by counsel, *Penn. R.R. Co. v. Midstate Co.,* 21 Cal.(2d) 243, simply upheld the validity of the waiver of the statute of limitations by the shipper in favor of the railroad carrier and on page 247 the court says "obviously a statute of limitations may be extended or waived" (citing cases).

Several of the other cases cited by counsel, to-wit, *Bennett v. Modern Woodmen,* 52 Cal. App. 581 and *Bollinger v. National Fire Ins. Co.,* 25 Cal.(2d) 399, have already been cited and discussed in our opening brief; see Op. Brief, pp. 11, 13, 19 and 23.

The whole argument of appellee's counsel overlooks the allegations contained in the plaintiff's complaint which are set forth on page 5, paragraph 8 of appellant's opening brief to-wit:

> "That plaintiff has fully complied with all the terms and conditions of said certificate of membership and duly and in the time provided for in said certificate notified the defendant of the death of said George Gifford and demanded payment of the Five Thousand Dollars ($5,000.00) insurance provided for in said certificate."

That such allegations are sufficient to defeat a motion for summary judgment, see,

Topping v. Fry, 147 Fed.(2d) 715.

That case likewise holds that the defense of "laches" may not be raised by motion to dismiss;—this must also be true as to the defense of the period of limitation.

THE LETTER OF DEFENDANT OF DECEMBER 21, 1943

The appellee lays great stress upon defendant's letter, Exhibit C, which was a portion of the moving papers on the motion for summary judgment which is set forth on page 25 of the record and also on page 13 of appellee's brief.

A careful reading of this letter discloses that it is not a reply to any *claim for payment by the plaintiff*. Its very opening paragraph discloses that it is a reply made by the appellee to the notice of the death of the plaintiff's father, sent by the mother of plaintiff, and that it was a statement that the defendant "in accordance with the *request made by your mother investigated the facts* in reference to such death."

Under the well-known rule of evidence it must be assumed on the hearing of such a motion for a summary judgment that no claim for payment by the plaintiff had then been made, because if defendant were in possession of such claim for payment it should have incorporated such claim in the affidavit; if any such claim had been made by plaintiff, the failure of defendant to produce it and incorporate it in its moving papers must be construed against it, to-wit, either that there was no such claim or that if there was that it was adverse to defendant's contention.

Appellee's counsel lay much stress upon the allegation in the plaintiff's complaint that "the defendant has refused payment" and seek, without justification, to tie this allegation to the letter of December 21st, 1943. For on page 17 of their brief counsel make the contention that this letter was the only communication the plaintiff re-

ceived and that therefore (sic) this letter must be deemed to be a refusal of payment. *There is nothing in the record to show when the plaintiff presented his claim for payment nor when the payment was refused.* The allegation in paragraph 9 of the complaint (trans. p. 5), "defendant has refused payment of said sum or any part thereof and the same and all thereof remains due, owing and unpaid," is merely the pleader's usual statement of facts necessary to show the breach of the obligation of the defendant to make payment.

It may well be that plaintiff's claim for payment was made at a much later date than the letter of December 21st, 1943. Such facts are evidentiary and must await plaintiff's proof at the trial.

Appellee's counsel makes much of the point that the plaintiff failed to disclose by any amendment to his complaint or by any affidavit any other act on the part of the defendant or that the plaintiff relied upon any acts or conduct of the defendant which might equitably estop the defendant from pleading the bar of the period of limitations. See page 14, appellee's brief.

As we pointed out in our opening brief on page 26, the plea of limitation is personal to the defendant. It might, as debtors often do, have waived the privilege and the bar of limitations does not appear on the face of the complaint.

It is not incumbent or necessary for the plaintiff to anticipate that the defendant will plead the bar of the period of limitation and therefore it is not necessary for him to anticipate such a defense and set up facts or cir-

cumstances which might toll the running of such limitation period. Such matters may be set up by the plaintiff in a replication to an answer which contains such a plea but the plaintiff is not obliged to anticipate such a defense and meet it before it is set up by defendant's answer.

Appellee's brief seeks to distinguish the case of *Ells v. Order of United States,* 20 Cal.(2nd) 290, which was cited on pages 10, 14, 15 and 16 of appellant's opening brief by claiming on page 16 of their brief that in that case the membership certificate did not contain any provisions expressly binding the *beneficiary* such as there are in this case. We find no such distinction in that case.

Moreover appellee has misquoted the provisions of the certificate of membership on page 15 of their brief wherein they state "this certificate, the constitution, by-laws and articles of incorporation of said Association and application for membership signed by said member and all amendments thereto shall constitute the agreement between said Association and said member and shall govern the payment of benefits and shall bind said members and his beneficiary or beneficiaries."

Counsel has left out from this quotation several lines which materially change the import of the clause, to-wit, the words as follows: "And any changes, additions or amendments to said constitution, by-laws or articles of incorporation hereafter duly made shall bind said member and his beneficiary or beneficiaries."

In any event we contend that regardless of the language of the certificate, the *beneficiary* under such a certificate in a fraternal society is not bound by Section 7 of the articles of incorporation, constitution and by-laws to bring

his action within six months as therein provided. (See Opening Brief, pages 9-16, inclusive.)

That the period of limitations within which an action must be brought contained in a policy of insurance is not a conclusive bar to the plaintiff filing a suit after the expiration of such period has squarely been held in the case of

Thompson v. The Phenix Insurance Co., 34 L.Ed. 408 (see 6th, 7th, 8th and 9th syllabus).

In that case the court reversed the judgment of the lower court, which dismissed the bill before answer was filed and in doing so used the following language (page 414):

> "What the fact may be, in respect to the authority of the agents, or whether the plaintiff had the right to rely upon those assurances and promises, and, if he did, whether the Company's rights were thereby affected, are questions not now to be decided. *Their determination will depend upon the answer and the evidence at the trial.*"

Under the principles and authorities cited in our opening brief and contained herein, we maintain that the judgment based upon the defendant's motion for a summary judgment and a dismissal of the complaint with prejudice was erroneous, premature, without foundation in law, and should be reversed.

Respectfully submitted,

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